83-5509

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CHARLES WILLIAM PROFFITT,

CROSS-PETITIONER,

V.

LOUIE L. WAINWRIGHT,

CROSS-RESPONDENT.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether certiorari should be granted to decide if defense counsel's failure to present any information concerning a capital defendant's background and character at sentencing and his mishandling of psychiatric evidence violates the defendant's Sixth and Eighth Amendment rights to the effective assistance of counsel?

2. Whether certiorari should be granted to decide if a district judge may overrule a magistrate's finding of ineffective assistance of counsel, where the magistrate heard the witnesses at an evidentiary hearing and the district judge did not?

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Cross-petitioner Charles W. Proffitt respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit denying habeas corpus relief on the ground that Mr. Proffitt was denied the effective assistance of counsel at the sentencing stage of his capital trial, and was denied his right to due process of law when the district judge, without hearing the witnesses, rejected a magistrate's recommendation that habeas relief be granted.

OPINIONS BELOW

The Report and Recommendation of the United States Magistrate recommending that habeas relief be granted on the ground that Mr. Proffitt was denied the effective assistance of counsel at the sentencing stage of his capital trial was filed July 7, 1980, and appears in cross-respondent's appendix to the

petition for writ of certiorari at A-223. The unreported opinion of the district court denying habeas relief was filed November 7, 1980 and appears at A-362 of the appendix to cross-respondent's petition for writ of certiorari. The opinion of the Eleventh Circuit granting partial habeas relief but denying relief on the grounds raised in this cross-petition was issued on September 10, 1982. A dissent on the ineffective assistance claim was issued on September 17, 1982. Both are reported at 685 F.2d 1227 (11th Cir. 1982), and appear at A-1 of the appendix to cross-respondent's petition for writ of certiorari. An order modifying the court's opinion on cross-respondent's petition for rehearing, reported at 706 F.2d 311 (11th Cir. 1983), appears at A-218 of the appendix to cross-respondent's petition for writ of certiorari. Cross-respondent's petition for rehearing en banc was denied, no member of the circuit court having requested a poll. 708 F.2d 734 (11th Cir. 1983).

JURISDICTION

The opinion of the court of appeals sought to be reviewed was entered on September 10, 1982. A timely petition for rehearing was denied on May 31, 1983. On August 19, 1983, Justice Powell granted cross-petitioner's application for extension of time to file this cross-petition to and including September 28, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right ...

> to be confronted with the witnesses against him ... and to have the assistance of counsel for his defense;

the Eighth Amendment to the Constitution which provides in relevant part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

and the Fourteenth Amendment to the Constitution which provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law ...

It also involves Section 921.141, Florida Statutes (1973), which is set out at App. A-1-4.

STATEMENT OF THE CASE

A. Course of Prior Proceedings

Cross-petitioner was convicted of first degree murder in the Circuit Court of Hillsborough County, Florida and sentenced to death on March 25, 1974. On appeal to the Florida Supreme Court, his conviction and death sentence were affirmed. Proffitt v. State, 315 So.2d 461 (Fla. 1975). A petition for writ of certiorari to this Court was granted to consider the constitutionality of the Florida death penalty statute on its face. Proffitt v. Florida, 423 U.S. 1082 (1976). The Court upheld the constitutionality of the statute under the Eighth and Fourteenth Amendments. Proffitt v. Florida, 428 U.S. 242, rehg. den., 429 U.S. 875 (1976).

A petition for writ of habeas corpus was filed in the United States District Court for the Middle District of Florida on June 21, 1979.[1] The district judge referred the matter to a

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1. Cross-petitioner exhausted his state remedies with respect to the issues raised in this petition. Proffitt v. State, 372 So.2d 1111 (Fla. 1979).

magistrate, who conducted an evidentiary hearing on September 25 and 26, 1979. On July 7, 1980, the magistrate issued a report recommending that habeas corpus relief be granted on the ground that cross-petitioner had been denied the effective assistance of counsel at the penalty stage of his bifurcated capital trial, and denied as to all other issues. Objections to the magistrate's Report and Recommendation were filed by both parties. Without hearing the evidence himself, the district judge overruled the magistrate on November 7, 1980, and ordered that habeas corpus relief be denied. Rehearing was denied on November 26, 1980. A certificate of probable cause to appeal was granted on December 17, 1980.

On appeal, the United States Court of Appeals for the Eleventh Circuit affirmed in part, reversed in part, and remanded to the district court. With respect to the issues presented in this cross-petition, a divided panel held that cross-petitioner had not been denied the effective assistance of counsel at the sentencing stage of his capital trial. The court also upheld the propriety of the district judge's action in rejecting the magistrate's recommendation without himself hearing the witnesses.

B. STATEMENT OF THE FACTS[2]

The issues presented in this cross-petition arise from defense counsel's failure to present any mitigating evidence of cross-petitioner's background and personal history at the sentencing phase of his capital trial, and counsel's mishandling of psychiatric evidence at the sentencing stage.

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2. The circumstances of the offense are adequately set forth in the decision of the Florida Supreme Court and will not be repeated here. Proffitt v. State, supra, 315 So.2d at 463.

At the time he was convicted and sentenced to death, Charles Proffitt was twenty-eight years old. Proffitt v. State, supra, 315 So.2d at 467. He had never before been arrested for or accused of an act of violence. (Pet. Ex. 6).[3] He had no prior criminal record, with the exception of one seven year old misdemeanor conviction.[4] Id. He had no history of violent behavior in his background.[5]

Mr. Proffitt, furthermore, had been steadily employed throughout his adult life, and was considered a reliable employee. (Pet. Ex. 9, p. 40; R. 434, 435, App. A below). Mr. Proffitt

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3. References to cross-petitioner's exhibits, admitted in evidence at the habeas hearing, will be designated "Pet. Ex." or "App." followed by the exhibit number or letter. Citations to the record below will be designated "R."; citations to testimony at the habeas hearing will be designated "H.T."; citations to the trial record will be designated "T.R."

4. Mr. Proffitt was convicted in Stamford, Connecticut under Section 53-75, Connecticut General Statutes, a misdemeanor currently classified as criminal trespass. (Pet. Ex. 6). Mr. Proffitt had been found drunk, late at night, in a restaurant. No damage was done to the restaurant, and no property was taken. (R. 438). Mr. Proffitt received a ninety-day suspended jail sentence after pleading guilty to the charge. (Pet. Ex. 6).

5. To the contrary, Mary Bassett, a boarder in the Proffitt home and the State's key witness at trial, testified in a pre-trial deposition that he was a gentle person who "couldn't even kill a puppy that was almost half way dead." (Pet. Ex. 9, pp. 43-44). She had never seen him hit anyone. Id. Mr. Proffitt's wife confirmed this testimony in her pre-trial deposition. (Pet. Ex. 1, pp. 10-11). Both depositions were admitted in evidence at the habeas hearing. Cross-petitioner also submitted below a proffer of testimony of other friends and relatives available at the time of trial, confirming the non-violent nature of Mr. Proffitt's character throughout his life. (R. 434, 437). Evidence submitted also indicated that Mr. Proffitt's behavior since the homicide has remained non-violent. (App. A. below).

The proffer was submitted pursuant to an order of the magistrate and with the agreement of both parties that cross-petitioner would not need to produce the witnesses listed unless cross-respondent disputed the proffer. Although cross-respondent never disputed the contents of the proffer, cross-respondent complained to the district court that the proffer was improperly considered. The district court declined to consider the evidence proffered in overruling the magistrate. While cross-petitioner contends that the proffer was properly before the court below, the mitigating evidence at issue was, in any event, also before the lower court in other forms which were admitted without objection. See e.g., App. A (Clemency memorandum).

was a good provider, and an affectionate husband: both Mr. Proffitt's wife and Mary Bassett, a boarder in their home, testified in their pre-trial depositions that the Proffitts had a generally happy and stable marriage. (Pet. Ex. 1, p. 14, 22; Pet. Ex. 9, p. 39, 40, 44; T.R. 385; R.. 435, 437; App. A.) Mr. Proffitt was also a generous person: he had taken in and was supporting Mary Bassett and her infant child, and had often, at other times in his life, tried to help people in need. (Pet. Ex. 1, pp. 18-19; R. 435-37; App. A).

Mr. Proffitt had achieved this relative stability in his life despite a difficult family background. His father was a severe alcoholic whose drinking left the family destitute. (App. A). Mr. Proffitt married at an early age, but his wife was unfaithful to him, and the marriage ended in divorce. Id. Later, after he had married his present wife, their only child died in infancy. Id.

At the time of trial, the above-mentioned evidence was available to establish that Mr. Proffitt was a non-violent, decent man, for whom the murder was a single aberrational act.[6] None of this evidence was presented to the jury or judge at sentencing. No witnesses were called by defense counsel at the penalty phase of the trial. (T.R. 505). No pre-sentence investigation report was requested or submitted to the trial judge. No oral argument was made describing these mitigating aspects of Mr. Proffitt's background.

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6. On the night of the murder, Mr. Proffitt had been drinking steadily for eight hours. (T.R. 309, 311, 546; R. 434). After the offense, he surrendered himself to his brother, a police officer in his hometown of Stamford, Connecticut. (T.R. 351; R. 437).

Defense counsel's presentation to the jury at the penalty stage was limited to the cross-examination of Dr. James Crumbley, a physician Mr. Proffitt had seen when he requested psychiatric assistance at the Hillsborough County Jail. (R. 410). Crumbley, an employee of the Hillsborough County Sheriff's Department, id., was called by the State to testify concerning statements made to him by Mr. Proffitt to the effect that he had committed the murder because of an uncontrollable urge to kill, and that Mr. Proffitt feared he would kill again.[7] (T.R. 497, et seq.). Crumbley was allowed to testify only because defense counsel expressly waived cross-petitioner's patient-physician privilege with respect to his statements to Crumbley.[8] (T.R. 495).

On cross-examination, defense counsel, Rick Levinson elicited from the doctor his opinion that Mr. Proffitt was mentally disturbed. The prosecutor was able to undermine completely this "expert" opinion, however, establishing from Dr. Crumbley that (1) he was not a licensed psychiatrist or psychologist; (2) he had only seen Mr. Proffitt twice, for fifteen or twenty minutes; and (3) he had not performed any diagnostic test to support his opinion. (R. 501).

Prior to allowing Dr. Crumbley to testify, Levinson had undertaken no preparation for the presentation of

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7. Dr. Crumbley's testimony at the sentencing stage had nothing to do with the statutory aggravating factors, but Levinson did not object to this clear violation of state law.

8. Dr. Crumbley had assured Mr. Proffitt before he spoke with him that everything he said was privileged and would not be used against him. (T.R. 400, 401). Defense counsel succeeded in blocking Dr. Crumbley's testimony at the guilt stage of the trial based on the physician-patient privilege but then waived the privilege and allowed the doctor to testify for the State at the penalty stage. (T.R. 420, 497).

psychiatric evidence. (H.T. 181, 265). Levinson had first learned on the night before the trial that Mr. Proffitt had sought psychiatric help from Dr. Crumbley, when Dr. Crumbley called Levinson to express his opinion that Mr. Proffitt was seriously disturbed.[9] (H.T. 194, 258, 261). Levinson had never before questioned Mr. Proffitt's mental state.[10] (H.T. 181, 265). Levinson did not attempt to learn the basis for the doctor's opinion, or explore with him the possibility of presenting a psychiatric defense at the guilt or penalty stages of the trial. (H.T. 301). He did not attempt to obtain an expert evaluation of his client or expert advice on the validity of Crumbley's opinions. (H.T. 176, 184). After receiving Dr. Crumbley's telephone call, Levinson took no action to determine whether Mr. Proffitt was, in fact, mentally disturbed so that he could either (a) present that information to the sentencer through a qualified expert or (b) know whether Dr. Crumbley's opinion, if offered, could be persuasively rebutted. Nonetheless, Levinson allowed Crumbley to testify at trial.

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9. Dr. Crumbley informed Levinson that he believed it his duty to tell the prosecutor that Mr. Proffitt had confessed the offense to him, and feared he might do harm to someone else if acquitted and released. Levinson's "only concern" after receiving the phone call was whether he would be able to keep the doctor from testifying during the guilt stage of the trial. (H.T. 249, 255).

10. Levinson testified that he did not question his client's mental state because Mr. Proffitt had appeared lucid to him during his visits to the jail. (H.T. 181, 265). Levinson was not aware that Mr. Proffitt was heavily medicated during those visits, nor did he know that his client had attempted suicide and was being held without clothes. (H.T. 257).

After hearing Dr. Crumbley, the jury recommended that Mr. Proffitt be sentenced to death.[11] (T.R. 535). The trial judge then appointed two "licensed" psychiatrists, Drs. Coffer and Sprehe, to examine Mr. Proffitt to determine whether he was, in fact, mentally disturbed at the time of the offense and thus entitled to mitigation of his punishment. (T.R. 536). The court scheduled a hearing at which the doctors were to testify. (T.R. 43, 541). Before the hearing, both doctors filed reports expressing the opinion that Mr. Proffitt was not mentally disturbed. (T.R. 44, 46).

Levinson did not speak with Mr. Proffitt before or after the examinations or discuss with him the contents of the doctors' reports. (H.T. 442-43). Levinson did not seek an independent psychiatric examination of Mr. Proffitt (H.T. 176, 184, 257), nor did he attempt to obtain information about Mr. Proffitt to corroborate a defense of psychiatric mitigation. (H.T. 257). Levinson did not speak with the court-appointed psychiatrists, nor did he consult with any expert to prepare for cross-examination of the doctors. (H.T. 286, 300). On the day of the hearing, Levinson did not even advise Mr. Proffitt of the proceedings, and -- without consulting Mr. Proffitt -- "waived" his presence at the hearing.[12] (T.R. 542, H.T. 437, 442, 443, 447).

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11. The prosecutor also introduced a certified copy of the judgment of Mr. Proffitt's 1967 conviction. The document did not reflect that the offense ("breaking and entering without permission") was a misdemeanor, nor did it reflect the circumstances of the offense. (R. 571). The sentence was indicated in abbreviated form: "90 days ES" (execution suspended). The jury did not know that Mr. Proffitt had not been incarcerated, and, in fact, the prosecutor erroneously argued that he had been. (T.R. 512). Levinson did not explain the nature or circumstances of the offense or the sentence imposed.

12. Mr. Proffitt's absence during Dr. Coffer's testimony was one of the grounds for the grant of habeas relief by the court below. Proffitt v. Wainwright, supra, 685 F.2d 1261; A-164.

Levinson was unaware that Mr. Proffitt had been receiving substantial dosages of a major anti-psychotic medication throughout the period of his incarceration, and was medicated at the time of the examinations. (H.T. 257). Levinson did not know that Mr. Proffitt had recently engaged in repeated acts of self-mutiliation while incarcerated and was held with no clothes, as a precaution, by the jail. Id. Neither the examining doctors nor the trial court were aware of these facts. Proffitt v. Wainwright, supra, 685 F.2d at 1260, A-163. Significantly, the medication Mr. Proffitt was receiving had the effect of masking symptoms of mental illness, thus preventing an accurate diagnosis of Mr. Proffitt's mental state.[13] (Pet. Ex. 8).

Levinson also did not seek to counter highly inaccurate and prejudicial "facts" recited in one of the doctor's reports. Dr. Sprehe reported that Mr. Proffitt "had a long standing sociopathic personality characterized by resort to violence as a solution to life's problems" and that he had "numerous minor criminal convictions and other charges where he was not convicted." These prejudicial statements were not true.[14] A copy of Mr. Proffitt's

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13. The medication prescribed for petitioner (Mellaril), is in the same class of drugs as Thorazine, Compazine, etc. These drugs are collectively referred to by several descriptive terms including psychotropic medication, psychoactive medication, major tranquilizers and antipsychotic medication. See Rennie v. Klein, 462 F.Supp. 1131, 1136 (N.D.N.J. 1978) for discussion of psychotropic drugs; United States v. Bennett, 460 F.2d 872, 895 (D.C. Cir. 1972) (significance of such medication on expert evaluation of mental state).

14. The doctor's notes of his interview with cross-petitioner, on which the report was based, contained the following materially false information: that cross-petitioner had a criminal record which included stealing cars while a juvenile, breaking and entering three times, one charge of disturbing the peace, two assault charges and one charge for assault and battery. (Resp. Ex. 1). Similarly, Dr. Sprehe's notes reflect that cross-petitioner was involved in two fights while in the military service and that he received an Article 15 for one of these incidents. Cross-petitioner's military records, however, which were introduced in

criminal record, admitted at the habeas hearing, shows no arrests or convictions for any violent behavior and only one misdemeanor conviction. (Pet. Ex. 6). Both his military record and his criminal record demonstrate that petitioner had never been charged with or convicted of any offense relating to violent behavior. (Id.; Pet. Ex. 7). Deposition testimony already existed and witnesses were available to verify that petitioner was not a violent person. (Pet. Ex. 1, 9).

The jury, and ultimately the trial judge, were thus presented with a portrait of Mr. Proffitt as a lawless sociopath, a cold-blooded killer with a prior history of crimes and violence, a man with no mental disability and a propensity to kill again in the future. On the basis of this portrait --which could not have been more inaccurate -- Mr. Proffitt was sentenced to death.

THE DECISIONS BELOW

The magistrate, district judge and court of appeals all lay responsibility for the distorted image of Mr. Proffitt on defense counsel's failure to present available evidence in mitigation and his mishandling of the psychiatric evidence involved. But, while the magistrate and dissenting circuit judge

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(fn. 14, cont.) evidence at the habeas hearing (Pet. Ex. 7), show no fighting incidents whatsoever. The Article 15 which cross-petitioner received was for swearing in the presence of a female PX manager. (Id.). No pre-sentence investigation report was requested by either defense counsel or the trial judge. Proffitt v. Wainwright, supra, 685 F.2d at 1248; A-107, and the trial judge, thus, received no information disputing Dr. Sprehe's statements. Sprehe did not appear in court to testify, as ordered by the trial judge, thus denying Mr. Proffitt the right to cross-examine Dr. Sprehe on these inaccurate statements. This denial of cross-examination of Dr. Sprehe was the second ground for the court of appeals' grant of habeas corpus relief. Id. at 1255; A-141.

found counsel to have been ineffective, the district court and the court of appeals majority excused his representation on the ground that the law was too unclear for him to have understood that he had the ability and responsibility to present mitigating evidence of Mr. Proffitt's background and character, to request a pre-sentence report, or to consult with experts concerning the psychiatric evidence.

Defense counsel, Rick Levinson, an assistant public defender, had only been practicing law for a year and a half at the time of Mr. Proffitt's trial. (R. 39). Levinson's trial experience had necessarily been limited, and he had never before been counsel in a capital case.[15] Id.

Levinson admitted at the habeas hearing that he had limited his preparation for trial to the guilt phase of cross-petitioner's trial. (H.T. 186-87, 193). He conceded that he did not develop a strategy for the penalty trial which would follow immediately after cross-petitioner's conviction for first degree murder. (Id., 252-53). Levinson's preparation was thus restricted to his efforts during the thirty-five minutes recess between the guilt and penalty stages of the trial. (T.R. 492-93).

Levinson testified that he thought the Florida death-penalty statute limited what evidence might be presented in mitigation to the circumstances enumerated in the statute. (H.T.

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15. Levinson's inexperience as a trial attorney is reflected well in his opening statement. When he had difficulty explaining to the jury why certain testimony should be disregarded, he told them that "the guys in law school used to call me 'Loophole Levinson.'" (T.R. 150). The nickname "Loophole Levinson" gave the prosecutor effective ammunition in his efforts to discredit Levinson's defense: "Now, Mr. Levinson has thrown a lot of smoke into this place in the last three days .. a lot of tricks ... Even his opening argument ... They called me 'Loophole Levinson' in law school ... Let's look for a loophole." (T.R. 448).

190-91, 219-28, 281). He stated, however, that he probably could have found a way to present character and background evidence. (H.T. 91-92). Even so he did not consider introducing any evidence to prove that Mr. Proffitt was not a violent person because that fact "was not a mitigating circumstance." (H.T. 275). He "really didn't consider" introducing evidence of petitioner's work history or his reputation as a reliable employee for similar reasons. (H.T. 282). When asked whether he could have called Mr. Proffitt's mother as a witness he replied "I don't know for what reason, other than the possible sympathy it might have evoked from the jury." (H.T. 272). "That is not a mitigating circumstance, what a mother thinks of her son." (H.T. 281).

With regard to the psychiatric evidence presented, Levinson admitted that he was not qualified to assess Mr. Proffitt's mental state (H.T. 256), and that he had not consulted with a qualified expert to educate himself regarding psychiatric diagnosis in general or Mr. Proffitt's diagnosis in particular. (H.T. 257). Levinson's decision to allow Dr. Crumbley to testify, and his attempt to cross-examine Dr. Coffer, were undertaken without preparation or investigation of the facts or medical issues involved.

After a two-day evidentiary hearing, the Magistrate issued a Report and Recommendation holding, inter alia, that cross-petitioner had been denied the effective assistance of counsel at sentencing. The magistrate found that

> ... the evidence at the guilt stage shed virtually no light on the petitioner as an individual. Nevertheless, the petitioner's counsel presented no evidence of petitioner's character and personal history at the penalty stage. The failure to present such evidence was not the

> result of tactical considerations or the absence of such evidence. It was, rather, the product of defense counsel's assessment that he was limited to the statutory mitigating factors, and, to some extent, a lack of preparation, although this may have been largely a consequence of his misperception of the law.

A-319.

The magistrate further found that Levinson was ineffective for allowing Crumbley to testify without having first investigated the psychiatric mitigating evidence to determine whether there was a credible mitigating presentation to be made, and, if so, then presenting such evidence through a qualified witness. A-327-28. The magistrate found that this failing alone might be deemed ineffective, but, at the least, the presentation of Crumbley's testimony required the introduction of other humanizing information about Mr. Proffitt.[16] Id.

The district judge rejected the magistrate's recommendation that habeas be granted on the ground of ineffective assistance of counsel, without hearing any of the witnesses. A-367. He held that Levinson's belief that the statute prohibited the presentation of nonstatutory mitigating evidence was reasonable at the time of Mr. Proffitt's trial in 1974. He found that "...counsel's misapprehension of the law can only be characterized as a misapprehension through hindsight which has the advantage of Lockett v. Ohio decided four years later." A-379. He further held that "[i]n any event, it is far to much to say that counsel's election not to call any witnesses during the penalty phase was

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16. The magistrate found it unnecessary to discuss Mr. Proffitt's other examples of Levinson's ineffectiveness at the sentencing hearing, including his failure to object to improper argument or his own ignorance of applicable law. A-330.

attributable to a mistake of law or insufficient preparation rather than tactical considerations or the lack of such evidence."[17] A-379.

The district court further concluded (1) that since under state law it was unclear whether pre-sentence investigation reports were available in capital cases at the time, Levinson could not be faulted for not requesting one; A-395-400 (2) that Levinson's use of the jail physician to establish psychiatric mitigating evidence was not ineffective because Levinson "used what he had, and it may well have been all he could get" A-390; and (3) that by allowing Mr. Proffitt's prior conviction to be admitted in evidence without explanation, the conviction remained "low profile," and that any explanation of the event might have led to evidence of other criminal behavior.[18] A-392-93.

On appeal, a divided court held that Levinson had not been ineffective in failing to present character evidence or in neglecting to request a pre-sentence investigation report which would have described Mr. Proffitt's background and personal history, because Levinson could reasonably have believed at the time of trial that the sentencing statute limited consideration of mitigating evidence to the factors enumerated in the statute. Proffitt v. Wainwright, supra, 685 F.2d at 1248; A-104-05. The majority held that the decision in Lockett v. Ohio, 438 U.S. 586 (1978), decided four years after the trial, could not have been foreseen, A-105, and that Florida law at the time could

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17. In support of this conclusion, the judge cited the very portions of Levinson's testimony presented to the magistrate in the State's proposed findings of fact, and rejected, if implicitly, in the magistrate's report and recommendation. A-380-82.

18. The district court cited the court-appointed doctor's inaccurate recitation of a prior criminal history in support of this speculation. A-394.

reasonably be interpreted to limit evidence in mitigation to the statutory factors. Id.; A-107. The majority decided that although "less than stellar," Levinson's handling of the psychiatric evidence was not so incompetent as to violate constitutional standards, since in 1974 counsel's responsibility to consult psychiatric experts for advice or assistance on sentencing was unclear. Id. at 1249-50; A-112-13. The majority did not discuss any other basis for its conclusion.

The dissent found that Levinson's failure to present any evidence or argument in mitigation constituted gross ineffective assistance of counsel, in violation of fundamental and long-established principles of adequate representation at sentencing. As the dissent stated,

> This ineffectiveness was starkly demonstrated by the failure to counsel to present any testimony at the sentencing hearing.

Id. at 1270; A-208.

The dissent also held that counsel's failure to investigate Mr. Proffitt's mental state after Dr. Crumbley's phone call further constituted ineffective assistance of counsel. Although disagreeing with the majority that Levinson could not have foreseen the decision in Lockett, the dissent reasoned that, in any event, psychiatric mitigating evidence was within the realm of the statute, and should have been explored. In this regard, the dissent stated,

> This court has long recognized the responsibility of counsel to acquire expert psychiatric assistance when a defendant's mental condition may be critical to the outcome of his case.

Id. at 1271; A-213.

The court of appeals further decided that the disagreements between the magistrate and the district court were not based on "credibility" choices, but on differing views of the significance of Levinson's acts or omissions. Accordingly, the court of appeals held that the district court had not erred in rejecting the magistrate's recommendation without hearing the witnesses. Id. at 1246; A-94-95.

REASONS FOR GRANTING THE WRIT

I. Certiorari Should Be Granted To Determine Whether the Court of Appeals Applied an Erroneous Standard for Assessing the Competency of Counsel at Capital Sentencing Proceedings.

This case presents a clear example of an attorney's failure to fulfill the most basic function of counsel in a capital case -- to present available, substantial mitigating evidence to the sentencer who will determine whether his client lives or dies. The majority rejected the claim that counsel's failure rendered him ineffective not because substantial information in mitigation of sentence was unavailable, nor because counsel made a "tactical" decision to withhold it from the sentencer. Rather, the majority held that defense counsel "reasonably" could have misunderstood his right to present mitigating evidence in his client's behalf under Florida law in 1974.

Counsel's responsibility -- in any criminal case --to provide an accurate, humanized portrait of his client to the sentencing authority was recognized, without debate, long before Mr. Proffitt's trial in 1974. Mempa v. Rhay, 389 U.S. 128 (1967); Townsend v. Burke, 334 U.S. 736 (1948); see ABA Project on Minimum Standards for Criminal Justice, Standards Relating to: The Prosecution Function and the Defense Function 227 (1970);

"Standards Relating to Sentencing Alternatives and Procedures, §5.3(e), Duties of Counsel (1970); Amersterdam, Segal & Miller, Trial Manual for the Defense of Criminal Cases §§460-471 (3d Ed. 1974); National Advisory Commission on Criminal Justice Standards and Goals, Report on Corrections, Commentary to §5.18, p. 193 (1973); Frankel, Criminal Sentences: Law Without Order (1972); Kuh, "For a Meaningful Right to Counsel at Sentencing," 57 A.B.A.J. 1096 (1971); Portman, "The Defense Lawyer's New Role in the Sentencing Process," 34 Fed.Prob. 3 (1970); Miller, "The Role of Counsel in the Sentencing Process," 2 Criminal Defense Techniques §40.05 (Cipes ed. 1969).

No court has ever before held that a defendant may, consistent with the Sixth Amendment, be denied such assistance because his attorney "misunderstood" the law. Indeed, even in cases where judicial discretion at sentencing is severely limited, this Court has noted "the necessity for the aid of counsel in marshaling the facts, introducing evidence of mitigating circumstances and in general ordering and assisting the defendant to present his case." Mempa v. Rhay, 389 U.S. 128, 135 (1967).

The Sixth Amendment obligations of counsel at sentencing are even more compelling in a capital case, where "it is constitutionally required [under the Eighth Amendment] that the sentencing authority have information sufficient to enable it to consider the character and individual circumstances of a defendant prior to imposition of a death sentence." Gregg v. Georgia, 428 U.S. 133, 189 n. 38 (1976) (emphasis added). This Court has made clear that in capital cases consideration of the character and record of the individual offender is "a constitutionally indispensable part of the process of inflicting the penalty of death." Woodson v. North Carolina, 428 U.S. 280, 304 (1976)

(plurality opinion) (emphasis added); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (emphasis added). But the sentencer cannot make the kind of individualized determination envisioned by the Court if counsel has not marshaled and presented the relevant information regarding the defendant's character and background.

The Court has expressly recognized the crucial importance of counsel's function at such capital proceedings as a zealous advocate for the preservation of his client's life. Gardner v. Florida, 430 U.S. 349, 360 (1977). In Gardner, a case involving a capital conviction in Florida prior to Mr. Proffitt's, the Court held that counsel had been improperly denied access to all the information contained in a pre-sentence investigation. The Court vacated the death sentence imposed in light of "the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases." Id. at 360.

By contrast, in this case, there was no pre-sentence investigation or even oral argument by counsel setting forth relevant aspects of Mr. Proffitt's character and individual circumstances available in mitigation of sentence. Neither the judge nor the jury were provided with any information concerning Mr. Proffitt's upbringing, family, marital situation, non-violent background, education, employment history, military record or other elements of character or background basic to an informed decision as to punishment.

The Eighth Amendment precludes imposition of a sentence of death under such circumstances. Lockett v. Ohio, 438 U.S. 586 (1976). The Sixth Amendment cannot permit a death sentence on any less information.

The court of appeals majority did not dispute the importance of this information in Mr. Proffitt's case. The majority agreed with the magistrate that the jury's impression of Mr. Proffitt was "possibly unbalanced," id. at 1247, and "that a cogent presentation of character evidence could have influenced the jury to recommend a life sentence." Id. The majority ruled, however, that counsel reasonably believed in 1974, that he could not, under Florida law, introduce evidence of mitigating factors not listed in the Florida death penalty statute, Fla. Stat. §921.141(6). The majority thus held that

> "[counsel's] decision not to call witnesses at the penalty stage to testify about [Mr. Proffitt's] general character and background was therefore justifiable and fully within the sixth amendment standard of reasonably effective assistance."

Id. at 1248.

The majority's rationale for excusing counsel's conduct is not only inappropriate given the Eighth Amendment's requirement of individualized sentencing, but also conflicts with judicial interpretations of the Florida Statute. Songer v. State, 322 So.2d 481 (Fla. 1975); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 400 U.S. 976 (1979); Lockett v. Ohio, supra, 438 U.S. at 606. The majority did not hold that counsel was correct in his view of the law, nor could they without calling into question the constitutionality of the Florida Statute at the time. Lockett v. Ohio, supra.

Moreover, the inquiry into counsel's effectiveness does not end with whether counsel's belief was "reasonable," but includes an examination of what competent counsel, harboring such a belief, would have done. Levinson's belief that he was limited to mitigating circumstances as enumerated in the statute

made it all the more important for him to thoroughly investigate and prepare the psychiatric mitigating evidence and the circumstances of Mr. Proffitt's prior offense.[19]

Levinson did neither. Again the majority excused his performance on the ground that the law did not clearly entitle him to request a presentence report or the assistance of psychiatric experts at sentencing. The majority's ruling ignores the crucial fact, however, that Levinson never claimed that he was limited by the law in his preparation of a psychiatric defense or in his failure to request a presentence investigation. Rather, he admitted that he simply did not concern himself with what evidence might be presented at sentencing until after the guilt phase of the trial, when he had no time to prepare.

The result of the majority's opinion is that counsel who fails to provide the sentencing authority with the most basic and traditional information about his client will be excused if his failure rests on a mistaken assumption about the law. Neither the Sixth Amendment right to the effective assistance of counsel, nor the Eighth Amendment right to an informed and individualized sentencing determination can tolerate a standard so low that it allows a death sentence to be imposed with no adequate information regarding the defendant's character or background. That, in effect, is the standard established by the majority. Certiorari should be granted to repudiate that standard.[20]

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19. The statute specifically provides for mitigation of sentence if a defendant has "no substantial history of prior criminal activity," or committed the homicide while mentally disturbed. Fla. Stat. §921.141(6)(a)(b)(f).

20. This Court has recently granted certiorari in Strickland v. Washington, No. 82-1554, ___ U.S. ___, cert. granted, 51 U.S.L.W. 3871 (June 6, 1983), to determine the appropriate standard for effective assistance of counsel at capital sentencing proceedings.

II. Certiorari Should be Granted to Determine Whether A District Judge May Overrule a Magistrate's Findings of Fact Without Himself Hearing the Witnesses.

This Court, in United States v. Raddatz, 447 U.S. 667 (1980), expressly left open the question whether a district judge may reject the factual findings of a magistrate to whom he has referred a matter under the Federal Magistrates Act, 28 U.S.C. §630(b)(1)(8), without himself hearing the witnesses. That unresolved issue is presented by this case. Certiorari should be granted to resolve the issue, which has important due process implications.

In determining whether there was a conflict in "credibility choices" made by the magistrate and the district court, the court below looked for specific contradictory statements cited in each. That approach is inappropriate. The magistrate, who heard Levinson testify, did not list every statement by Levinson that he disbelieved, nor should he have to. The district judge could not know, when he relied on some of Levinson's statements, whether the magistrate had accepted or rejected the statement. In an area as sensitive as competency of counsel, an evaluation of counsel's performance is necessarily shaped by the fact-finder's impression of counsel's sincerity and thoughtfulness in explaining his acts or omissions. It is this kind of assessment of credibility that lies at the heart of the fact-finding function. The court of appeals' standard requiring citation to specific contradictory testimony in a district court's rejection of a magistrate's fact-findings undermines Due Process protections.

Certiorari should be granted to determine whether Due Process is violated when a district court rejects a magistrate's factual findings without himself hearing the witnesses and whether

the court of appeals' standard for assessing credibility choices is an appropriate one.

CONCLUSION

For the foregoing reasons, the Cross-Petition for Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED,

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ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I, David S. Golub, Esq., hereby certify that on September 28, 1983, I served the foregoing Cross-Petition for Writ of Certiorari on counsel for the petitioner by depositing a copy in the United States mail, first class, postage prepaid, addressed as follows:

Charles Corces, Esq.
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602

/s/ DAVID S. GOLUB
DAVID S. GOLUB

APPENDIX

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY. Upon conviction or adjudication of guilt of a defendant of capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by §775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If the trial jury has been waived or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7) of this section. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of the constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY. After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the foregoing matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life *[imprisonment] or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH. Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with §775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE. The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record unless the time is extended for an additional period not to exceed 30 days by the supreme court for good cause shown. Such review by

the supreme court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) AGGRAVATING CIRCUMSTANCES. Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use of threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) MITIGATING CIRCUMSTANCES. Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

83-5509

~~No. 82-112~~

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

LOUIE L. WAINWRIGHT,

PETITIONER/CROSS-RESPONDENT,

V.

CHARLES W. PROFFITT,

RESPONDENT/CROSS-PETITIONER.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent/cross-petitioner Charles W. Proffitt, by his undersigned counsel, asks leave to file a Brief in Opposition to the Petition for Writ of Certiorari and a Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit without prepayment of costs, and to proceed in forma pauperis pursuant to Rule 46 of the Rules of this Court.

An affidavit of indigency has been forwarded to respondent/cross-petitioner but has not yet been received by counsel. It will be forwarded to the court immediately upon receipt. A copy of the affidavit, and counsel's affidavit in support of this motion, is attached hereto.

RESPECTFULLY SUBMITTED,

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ATTORNEYS FOR RESPONDENT/CROSS-PETITIONER
CHARLES W. PROFFITT

CERTIFICATE OF SERVICE

I, David S. Golub, Esq., hereby certify that on September 28, 1983, I served the foregoing Cross-Petition for Writ of Certiorari on counsel for the petitioner by depositing a copy in the United States mail, first class, postage prepaid, addressed as follows:

Charles Corces, Esq.
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602

/s/ DAVID S. GOLUB
DAVID S. GOLUB

NO. 83-113

83-5509

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

LOUIE L. WAINWRIGHT,

PETITIONER/CROSS-RESPONDENT,

V.

CHARLES W. PROFFITT,

RESPONDENT/CROSS-PETITIONER.

AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED IN FORMA PAUPERIS

I, Charles W. Proffitt, being first duly sworn, depose and say that I am the respondent and cross-petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which are presented to this Court concern the constitutionality of my conviction and sentence in the Circuit Court for Hillsborough County, Florida.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding on petition for a writ of certiorari in this Court are true.

1. Are you presently employed?

ANSWER: No, I am not presently employed. I was last employed in July 1973. At that time, my average monthly salary and wages were approximately less than $130 a week

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

ANSWER: No, I have not received any such income.

3. Do you own any cash or checking or savings account.

ANSWER: No, I do not own any cash or any such account.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

ANSWER: No, I do not own any such property.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

ANSWER: No persons are dependent upon me for support.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Charles W. Proffitt
CHARLES W. PROFFITT

Subscribed and sworn to, before me, this 13 day of October, 1983.

Notary Public
NOTARY PUBLIC

[illegible]

No. 83-5509

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CHARLES WILLIAM PROFFITT,

Petitioner,

vs.

LOUIE L. WAINWRIGHT,

Respondent

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Counsel for Respondent

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CHARLES W. PROFFITT,

Cross-Petitioner

v.

LOUIE L. WAINWRIGHT,

Cross-Respondent

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OPINION BELOW

The opinion of the Eleventh Circuit Court of Appeals appears in 685 F. 2d 1227 (11th Cir. 1982). The order modifying its opinion appears at 706 F. 2d 311 (11th Cir. 1983).

As does Cross-Petitioner, Cross-Respondent in the interests of brevity will refer to the appendix of this Cross-Respondent accompanying his Petition for Writ of Certiorari as "A" followed by the appropriate page number.

JURISDICTIONAL STATEMENT

The Cross-Respondent does not question the jurisdictional statement as set out in the Cross-Petition for Writ of Certiorari.

STATEMENT OF THE FACTS

Cross-Respondent denies that Cross-Petitioner had no history of violent behavior in his background. Dr. Daniel J. Sprehe testified at the evidentiary hearing before the

magistrate as follows:

Q. Did Mr. Proffitt, thereafter, during the course of this interview, discuss with you his background, character and so forth?

A. Yes.

Q. Was that used by you in evaluating Mr. Proffitt's psychiatric condition?

A. Yes .

Q. All right. What background did he give you?

A. He told me that his criminal record was that he stole cars five times as a juvenile. That he had done three B and E's and done ninety days -- I don't have it clear in my mind if that was cumulative for one of them in the West.

He had charge of Disturbing the Peace. [sic]

Two times he had been charged with Assault and one time with Assault & Battery.

He also had a ninth grade education. He felt like he could read but couldn't write too well. He was in the Service in 1964 and 1965 and in the Army got an Undesirable Discharge, because of several things; he was AWOL for one week-- they caught him and returned him for six weeks in the stockade. Then he had two fights in the Service for which he received an Article 15-- received one Article 15 for the two fights.

He also lied about his police record to get in the Service; and he stated that the accumulation of all of this; he was discharged on an Undesirable Discharge.

He told me as a child he got in fights a lot. He was known as the "KO Kid" when he was young, and he also used to be called "Stonehead" because he was always hit in the head.

He was a member of a Westside gang known as the "Capones" on the West side of Stanford, Connecticut.

We repeat this testimony of Dr. Sprehe , not because we wish to discuss Cross-Petitioner's character, but because in this Cross-Petition and in his brief in opposition to the Petition for Writ of Certiorari, Proffitt's counsel suggests that Dr. Sprehe inaccurately described Proffitt's history as containing violent behavior and that Dr. Sprehe had relied on inaccurate information. The fact is that Dr. Sprehe relied on information supplied to him by Proffitt himself.

Cross-Respondent also denies that at the time of trial evidence was available that Proffitt was ". . . a non-violent decent man, for whom the murder was a single aberrational act" (cross-petition p. 6).

The fact is that there was little, if any, evidence available which could have been utilized by defense counsel to demonstrate Cross-Petitioner was a non-violent person. The Circuit Court of Appeals summarized the endeavors made by defense counsel in preparation and the various tactical reasons why he did not call certain witnesses. This summarization will not be repeated here but can be found at A-66-68. See also A-380-382.

Cross-Petitioner, of course, argumentatively continues to rely on his so called "proffer" for his assertion that such witnesses were available. But as the District Court observed the "proffer" was filed after the evidentiary hearing. The District Court ruled that this "proffer" was not evidence and it would not be relied upon to support the assertion that certain witnesses were available at the time of trial some five years earlier (A-390-391). The Court of Appeals upheld this ruling (A-60-61).

REASONS FOR DENYING WRIT

We do not believe that either question presents a substantial constitutional question which would justify the granting of certiorari. In the first place, with respect to question one the lower court determined counsel was not ineffective by virtue of any failure to present mitigating evidence because

> [a]lthough the attorney testified that his interpretation of the statute influenced his decision as to what evidence to present at the sentencing hearing, he suggested that other reasons were important as well. In particular, he stated that he believed that he could fit any mitigating evidence within the statutory mitigating factors, id. at 191-92, and that, in any event, the defendant had instructed him not to introduce any mitigating evidence. Id. at 220-221.
>
> A-58

Moreover, the District Court outlined the tactical reasons why, as Petitioner's trial counsel testified, many witnesses, such as Petitioner's mother, half brother, wife and sister were not called as mitigating witnesses. (A-381-382)

It is thus abundantly clear that Petitioner seeks certiorari, not so that this court can settle a question of great constitutional import, but in order to have this Court review factual findings made by the court below as to what or why Petitioner's trial counsel did or did not do.

As to Question II Petitioner suggests that in United States v. Raddaty , 447 U.S. 667 (1980) this Court left open the question as to whether a District Judge may reject factual findings made by a magistrate, without rehearing the witnesses.

We disagree. In Raddity this Court said:

> We conclude that the due process rights claimed here are adequately protected by §§ 636(b)(1)(B) and (C). While the district court judge alone acts as the ultimate decisionmaker, the statute grants the judge the broad discretion to accept, reject, or modify the magistrate's proposed findings. That broad discretion includes hearing the witnesses live to resolve conflicting credibility claims. Finally, we conclude that the statutory scheme includes sufficient procedures to alert the district court whether to exercise its discretion to conduct a hearing and view the witnesses itself.
>
> 447 U.S. at 680

The issue which this Court apparently did not reach, but left for a day when it does in fact arise is whether a District Judge may reject a "credibility choice" made by a magistrate Raddity, footnote 7. But the lower court determined there were no credibility choices involved. A-68-71. Since no credibility choices were made this case does not involve any unanswered question.

CONCLUSION

Based on the above and foregoing reasons we do not believe that the Cross-Petition for Writ of Certiorari should be granted.

Nevertheless, since this case presents a classic example of the view that no judgment and sentence, however validly obtained, can withstand the funneled hindsight scrutiny of court after court and judge after judge, years after the fact, we would not hesitate in welcoming an acceptance of this court of the entire case.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, CHARLES CORCES, JR., Counsel for Respondent, and a member of the Bar of the United States Supreme Court, hereby certify that on this 13th day of October, 1983, I served one copy of the Cross Petition For Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit on Mr. David S. Golub, Silver, Golub and Sandak, 184 Atlantic Street, P. O. Box 389, Stamford, Connecticut 06904 by a duly addressed addressed envelope with postage prepaid.

OF COUNSEL FOR RESPONDENT